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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FRANCIS MATA, Defendant and Appellant.	B226256 (Los Angeles County Super. Ct. No. BA366071)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman J. Shapiro, Judge. Reversed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Francis Mata appeals from the judgment entered following a jury trial in which he was convicted of possession of cocaine base and two misdemeanor counts of resisting an officer. Defendant contends the trial court erred by reseating a prospective juror improperly challenged by the prosecution instead of discharging the venire after it granted his motion under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). We agree because defendant neither waived nor consented to the juror's reseating. Accordingly, we reverse.

BACKGROUND

On the afternoon of December 21, 2009, Los Angeles Police Department narcotics officers conducted surveillance on San Julian Street between 6th and 7th Streets in downtown Los Angeles. Detective James Miller saw defendant walking on the sidewalk with Earl Early, who held cash in his hand. Early and defendant stopped next to Anthony Coleman. Miller testified he saw Coleman spit a plastic-wrapped item into his hand, remove a small white object from it, hand the object to Early, and take Early's cash. Coleman walked away, and Early and defendant crouched near a fence. At Miller's direction, other officers detained the three men. Coleman, who was tried with defendant, had $5 and six small rocks that together weighed 0.52 grams and contained cocaine base. Defendant had one rock that weighed 0.02 grams and contained cocaine base. Early threw down a glass smoking pipe and one rock that weighed 0.02 grams and contained cocaine base.

At the police station, defendant expressed anger and refused to walk when two officers attempted to escort him to another area. He leaped up and backward, and his body struck one of the officers in the face. He continued to move after the officers tackled him and told them to release his handcuffs so he could fight them with his good hand.

Coleman testified that he purchased the rocks of cocaine base on the afternoon of his arrest for personal use. He was a long-time, heavy user of cocaine base and intended to smoke all of the rocks he had in rapid succession. He did not provide Early or

defendant with any cocaine base or take money from Early, but merely lent Early his smoking pipe. Coleman saw police officers knee defendant in the back and drag him at least 20 feet to the middle of the street. An officer threatened to do the same to Coleman if he did not turn and face the other way.

The jury convicted defendant of possession of cocaine base and two misdemeanor counts of resisting an officer (Pen. Code, § 148, subd. (a)(1)). The court sentenced him to two years in prison.

DISCUSSION

On the fourth day of jury selection, the prosecutor exercised his 11th peremptory challenge against Prospective Juror No. 2473. Counsel for defendant stated, "I ask for a side bar after she leaves." The court directed the prospective juror to remain in her seat, then conducted a conference with counsel outside the presence of the jury. Counsel for defendant explained that he was making a *Wheeler* motion, stating that Prospective Juror No. 2473 was "the second African-American within the last few challenges" by the prosecutor. The court noted that the prospective juror's responses were "very neutral," and asked the prosecutor for his "thoughts." The prosecutor said he had been watching the prospective juror and "didn't find her to be as engaging [*sic*]. I found her to be extremely quiet. . . . I just felt that at times she was just kind of quiet and tuned out. And I wanted somebody who is a little bit more, to me, appear [*sic*] to be a little bit engaging." The court found there was no "justification" for challenging the prospective juror and stated, "I am going to disallow your challenge at this time. And I'd order that the juror remain seated." The court told the prosecutor he could exercise a peremptory challenge against a different prospective juror, "[a]nd we will continue the process." Counsel for defendant said nothing about the court's remedy, and voir dire continued, with Prospective Juror No. 2473 seated.

A little later, the prosecutor exercised a peremptory challenge against another African-American, Prospective Juror No. 207, who had stated she disliked police because she had been a victim of racial profiling and police mistreatment. Counsel for defendant

stated, "Your honor, I'd ask that she remain while we have a side bar." The court asked Prospective Juror No. 207 to remain seated and conducted a conference with counsel outside the presence of the jury. Counsel for defendant made a *Wheeler* motion that the court denied.

Defendant contends that the trial court erred by reseating Prospective Juror No. 2473 instead of dismissing the venire because defendant did not waive or consent to the juror's reseating.

In *Wheeler, supra,* 22 Cal.3d at page 282, the California Supreme Court held that if a trial court concludes that one party has impermissibly exercised peremptory challenges on the basis of group bias, the court "must dismiss the jurors thus far selected" and "quash any remaining venire."

In *People v. Willis* (2002) 27 Cal.4th 811 (*Willis*), the Supreme Court noted "the need for the availability of some discretionary remedy short of dismissal of the remaining jury venire" and that the remedy prescribed by *Wheeler* is not compelled by the federal Constitution. (*Willis*, at p. 818.) The court concluded, "We think the benefits of discretionary alternatives to mistrial and dismissal of the remaining jury venire outweigh any possible drawbacks. As the present case demonstrates, situations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial. Under such circumstances, and with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. In the event improperly challenged jurors have been discharged, some cases have suggested that the court might allow the innocent party additional peremptory challenges." (*Id.* at p. 821.) "We stress that such waiver or consent is a prerequisite to the use of such alternative remedies or sanctions, for *Wheeler* made clear that 'the complaining party is entitled to a random draw from an entire venire' and that dismissal of the remaining venire is the appropriate

remedy for a violation of that right. [Citation.] Thus, trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party. On the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (*Willis*, at pp. 823–824.)

In *Willis*, defense counsel unsuccessfully moved to dismiss the venire as underrepresentative of African-Americans, then used seven of eleven peremptory challenges to remove White men from the jury. (*Willis*, *supra*, 27 Cal.4th at pp. 814–815.) The prosecutor made a *Wheeler* motion, and the trial court found systematic exclusion of a protected class. The court asked the prosecutor, "'So now what do you want me to do about it?'" The prosecutor replied, "'[A]t this point obviously the remedy of excusing a panel would only . . . serve to his benefit because that is what he is seeking to do. At this point I would ask for the court to admonish him to not continue that kind of behavior. And if he does, sanction him if he does so.'" (*Id.* at p. 815.) "Defendant moved for a mistrial, asserting he should not be left with the remaining members of the original venire, and claiming that the process was depriving him of a fair trial. The court denied the motion, stating for the record its 'suspicion' that counsel was committing *Wheeler* error in the hope the court would dismiss the venire, and admonishing counsel that such a tactic would be illegal, immoral and improper. Jury selection resumed. The court did not excuse the venire or reseat any of the improperly excused jurors. [¶] Later, the prosecutor made a second *Wheeler* motion based on defendant's using eight of his next nine peremptories to strike White males. After demanding explanations, the court again found defendant had violated *Wheeler*. The court sanctioned defense counsel with $1,500 in monetary sanctions . . . . Defendant's renewed motion for mistrial was denied. Again, the court did not reseat any improperly challenged jurors or quash the venire and begin jury selection again with a new venire." (*Willis*, at p. 816.) The Supreme Court

rejected Willis's claim on appeal that the trial court erred by not dismissing the venire. (*Id.* at p. 814.)

In *People v. Overby* (2004) 124 Cal.App.4th 1237 (*Overby*), the first time the prosecutor exercised a peremptory challenge against an African-American juror, counsel for Overby asked the court to order the juror to remain in the courtroom, then made her *Wheeler* motion. The trial court granted the motion and said, "'I'm going to elect the remedy to reseat Number 9 rather than the remedy to kick the entire panel.' The court then asked counsel if they wished to be heard 'as to the court's decision.' Both defense counsel said, 'Submit,' and the prosecutor objected. The challenged juror was reseated and voir dire resumed." (*Overby*, at pp. 1242–1243.) The prosecutor made an unsuccessful *Wheeler* motion and later sought reconsideration of the rulings on both the defense and prosecution motions and asked the court to dismiss the venire. "At no time during the reconsideration arguments did Overby's counsel state that she agreed that the venire should be dismissed, nor did she indicate any dissatisfaction with the remedy chosen by the court." (*Overby*, at p. 1243.)

The Court of Appeal in *Overby* held that the consent required by *Willis* could be given by counsel, rather than defendant himself (*Overby*, *supra*, 124 Cal.App.4th at p. 1243), and concluded that defense counsel implicitly consented to the court's remedy by asking the court to prevent the challenged juror from leaving and responding "'Submit'" when the court asked counsel if counsel wished to comment on the court's chosen remedy (*Overby*, at p. 1244). The court further commented that its conclusion was "reinforced by the fact that [counsel for Overby] did not alter her position or indicate dissatisfaction with the reseating remedy even after having time and opportunity to consider it further," such as when the prosecutor sought reconsideration of the court's rulings on the *Wheeler* motions and asked the court to dismiss the venire. (*Overby*, at p. 1245.)

Nothing in the record in the present case indicates that the standard *Wheeler* remedy of mistrial and dismissal of the venire was likely to "accomplish nothing more

than to reward improper voir dire challenges and postpone trial." (*Willis*, *supra*, 27 Cal.4th at p. 821.) In contrast with *Willis*, here neither the court nor defendant suggested that dismissing the venire would reward the prosecutor for an improper peremptory challenge. Unlike *Willis*, the court did not ask the aggrieved party (defendant) to suggest or select a remedy, and the aggrieved party (defendant) did not suggest reseating the juror. Unlike *Overby*, defendant had not asked Prospective Juror No. 2473 to remain while he made the *Wheeler* motion. Indeed, defendant expressly asked to address the court at sidebar after the prospective juror left. Also in contrast to *Overby*, Prospective Juror No. 2473 was not the first African-American juror the prosecutor had challenged, the trial court did not ask counsel if they wished to comment on the court's chosen remedy, and defendant neither said that he submitted to the court's chosen remedy nor otherwise expressly or implicitly consented to the remedy. Defendant also did not have a second opportunity to express dissatisfaction with the court's alternate remedy, as Overby did in the context of the prosecutor's motion for reconsideration and request that the court dismiss the venire.

The Attorney General argues that defendant's consent to the alternate remedy is shown by his request that Prospective Juror No. 207 remain seated while the court addressed his second *Wheeler* motion. This request may have reflected nothing more than a recognition of, and decision to comply with, the earlier procedure that the trial court followed pending its ruling upon a *Wheeler* motion. Asking that the prospective juror remain pending resolution of the motion in no way indicates consent to reseating the juror as a remedy if the court grants the motion, which it did not. We might find consent if, as in *Overby*, Prospective Juror No. 2473 had been the first African-American prospective juror challenged by the prosecutor, defendant had asked that the prospective juror remain, the trial court had granted defendant's motion and said it would reseat the prospective juror and asked counsel if they wished to be heard, defendant had then submitted to the court's proposed remedy, and later when the prosecutor asked that the venire be dismissed, defendant did not join. But the trial court denied the second *Wheeler* motion.

Thus, as no remedy was provided, defendant did not consent or submit to a remedy, and there is an insufficient basis to infer any consent by defendant.

Thus, the trial court here did not obtain defendant's waiver or consent, as required by *Willis* and obtained by the trial courts in *Willis* and *Overby*. Because such waiver or consent "is a prerequisite to the use of such alternative remedies or sanctions" (*Willis*, *supra*, 27 Cal.4th at p. 823), the trial court improperly utilized the remedy of reseating Prospective Juror No. 2473. Defendant was entitled to commence jury selection with a new venire untainted by the prosecutor's impermissible use of peremptory challenges on the basis of race.

Given our disposition, we need not address the Attorney General's request to modify the judgment to include a variety of mandatory fees and penalty assessments that the trial court might have failed to impose.

DISPOSITION

The judgment is reversed.

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MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.